IN THE

Supreme Court of the United States

October Term, 1961

No. 291 Misc.

ROBERT MORALES, ET AL., *Petitioners*

v.

CITY OF GALVESTON AND CARDIGAN SHIPPING COMPANY, LTD., *Respondents*

RESPONDENT CARDIGAN SHIPPING COMPANY'S REPLY TO THE PETITION FOR WRIT OF CERTIORARI

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To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

The Respondent Cardigan Shipping Company, Ltd., respectfully prays that this Petition for Certiorari be in all things denied.

A.

The Opinions Below

The Findings of Fact and Conclusions of Law by the Trial Judge, sitting in Admiralty, are reported at 181 F. Supp. 191. (In copying these Findings of Fact as Appendix "E" of the Petition for Certiorari, and in the references thereto in the Petition, all Findings of Fact after "12" appear to have been numbered one more than in the official report). The Court of Appeals for the Fifth Circuit first affirmed in an opinion reported at 275 F. 2d 191 and dated February 22, 1960. Rehearing was denied April 8, 1960. On a first Petition for Certiorari this Court on October 17, 1960 entered a Per Curiam order reading "The Judgment of the Court of Appeals is vacated and the case is remanded to that Court for consideration in light of *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539". After having received supplemental briefs from the parties, and this reconsideration, the Court of Appeals for the Fifth Circuit rendered a second opinion, on May 17, 1961, which again affirmed the decree of the Trial Court denying a recovery to the Petitioners. (This latter opinion, not yet officially reported, appears as Appendix "F" to the present Petition for Certiorari).

B.

The Questions Presented

While the statement of the questions in the Petition for Certiorari, and the argument of that Petition, again raises issues of negligence, notice as an element of unseaworthiness, and the factual support for the findings made by the Trial Court, the single question now presented would

appear to be whether, under the facts as found by the Trial Court and which the Court of Appeals has found were not erroneous, this respondent caused injury to the petitioners by failing to provide a ship and appurtenances reasonably fit for their intended use. In the second consideration of this case by the Court of Appeals the majority of that Court makes it clear that their earlier affirmance of the Trial Court had not been rested upon a doctrine of "temporary unseaworthiness" or the absence of some notice to the shipowner, and that the shipowner's satisfaction of the obligation to provide a seaworthy ship, as now delineated in *Mitchell,* has been re-affirmed under the particular facts of this case.

C.

Statement of the Case

In view of the contentions of the Petition special attention is directed to these facts, found by the Trial Court and supported by a clear preponderance of the evidence:

(1) The cargo bin on respondent's ship, the GREL-MARION, in which Petitioners were trimming grain, was of customary design, was clean, and was in all respects ready and fit to receive grain as it came from the elevator spouts.

(2) The absence of a forced ventilation system for this cargo bin did not affect its suitability for the purpose intended. Not only did no witness actually testify to the use or need for such a system (cf R. 63, 107-108, 197, 215, 294) but it was also obvious from the petitioners' own description of their work that any blown air would have created an intolerable condition on account of grain dust. The references by the Petition for Certiorari (p.

28) to Coast Guard "advice" for the purpose of preventing asphyxiation, and the pictures reproduced as Appendix "G" to that Petition, relate *only* to precautions which are to be taken when fumigation has been carried out aboard a vessel. The GRELMARION had not been fumigated (Finding of Fact 17) and the references now offered by the Petition under this point were irrelevant to the case before the Trial Court and were not even tendered in evidence there. As found by the Trial Court (Findings of Fact 9, 10, and 11) and even more fully demonstrated in the Petitioners' own testimony the cause of any injury was not in the shortage of oxygen in their working space, notwithstanding that the entrance was covered by the "run" of grain, but was solely the contact with fumes coming directly off the grain from the elevator spout. (R. 45-47, 126, 147, 241, 280). The grain was still running from the spout as smarting eyes and other symptoms showed the presence of an alien substance on the grain. (R. 47, 78, 128-129, 147, 241, 284, 434, 553). That the hatch opening was temporarily covered by the running grain was not only not unusual, it was customary and normal. (R. 56, 67, 121, 189-190, 243-244).

D.

Argument

In its second opinion the Court of Appeals has made it clear that neither in that Court nor in the District Court were any facts found which made the GRELMARION unseaworthy even temporarily. The Petitioners' argument assumes the premise that, since *Mitchell*, not only may the liability for unseaworthiness arise from a transitory and instantaneous condition but that the liability necessarily

follows whenever an injury does occur since there was no longer a place to "work in with safety".

The error in the Petitioners' view of the evidence in this case has been pointed out by Judge Hutcheson in these words:

> " . . . the cause of the injury was not any defect in the ship but the fact that the last shot of grain which was being loaded was contaminated as the result of dangerous chemicals, harmful to human beings, having been used for the purpose of killing weevils. It is, in our opinion, a correct analysis of the situation to say that this is not, as the Mitchell case was, a case of a vessel being temporarily unseaworthy."
>
> (May 17, 1961 opinion).

Respondent respectfully suggests that the dissenting opinion by Judge Rives exhibits the same misapprehension of the evidence in the *Morales* case, if not of the rule of the *Mitchell* case, as is shown by the Petition. After quoting (in part) Finding of Fact 9 (181 F. Supp. 202) Judge Rives states "It is clear that temporarily the bin where the libellants were working was not a reasonably safe place in which to work". But if one reads not only Finding 9, but also 10, 11, 12, 13, 14, and 15 (Tr. pp. 84-89), or, even better, the Record which describes the whole matter in greater detail, it is patent that any injury to the Petitioners was solely and proximately caused by a direct contact with chloropicrin fumes which came from the grain as the elevator spout deposited that grain in the bin where Petitioners were working.

While the Petitioner, and Judge Rives, would equate the *Morales* case with *Mitchell* it might be more logical to say that Mitchell would be like Morales if the fisherman Mit-

chell had been stabbed in the hand by the spine of an unusual species of fish as he was working the nets of the Trawler Racer to bring aboard the usual catch.

> "Appellant seems to think that all the seamen must establish to warrant a recovery in this case is that there was grease on the gangway and that he slipped on the grease and was injured. In effect he says: grease is slippery, and, if grease was on the gangway and appellant slipped on it, he is ipso facto entitled to recover, as the vessel must have been unseaworthy. But the teaching of Mitchell is merely that there must be and is a 'complete divorcement of unseaworthiness liability from concepts of negligence,' and that the duty of the shipowner is not 'to furnish an accident-free ship' but 'only to furnish a vessel and appurtenances reasonably fit for their intended use'." . . .
>
> —*Blier v. United States Lines Co.*
> 2nd Cir., Feb. 1961, 286 F. 2d 920

The premise that while a place may be unsafe in which to work, as evidenced by the injury, this does not necessarily constitute unseaworthiness, is stated in a number of cases post-*Mitchell.*

Caraballese v. Nav. Aznar, 2nd Cir., Nov. 1960, 285 F. 2d 355, Cert. Den. 365 U.S. 872; 5 L. ed. 2d 862;
Arena v. Luckenbach S.S. Co., 1st Cir., on rehearing June, 1960, 279 F. 2d 186, at 189, Cert. den. 364 U.S. 895, 5 L. ed. 2d 189;
Billeci v. United States, N.D. Cal., July 1960, 185 F. Supp. 711;
Green v. Skibs A/S MANDEVILLE, E.D. Car., Aug.-Oct. 1960, 186 F. Supp. 459, 188 F. Supp. 65;
Knox v. United States Lines, E.D. Penna., Aug. 1960, 186 F. Supp. 668.

While the Trial Court found the respondent ship-owner and the co-respondent wharves operator not liable to these Petitioners for their injuries either on the ground of unseaworthiness or negligence, having heard all of the evidence on the issue of damages the Trial Court followed the commended practice of finding the amount of the damage sustained by each libellant. The Petition for Certiorari has attacked those findings as being inadequate as a matter of law. The basis for this attack is primarily a comparison of the damages as determined by the Court with the medical expense paid for and compensation paid to these longshoremen under the Longshoremen's and Harborworkers' Act. While submitting that the question as to the amount of damages should remain academic respondent also contends that voluntary payments under the Act, in a proceeding to which respondent was not a party, had no substantial weight as evidence. The Trial Court heard and also considered testimony on this issue which showed that the effects of this incident were discomforting more than painful, that no one had to be hospitalized, that no permanent consequence attached, and that even where the medical treatment was extended it served primarily to relieve the minds of the complainant. While emphasis is given by the Petitioners to the reduced earnings from their employment only on banana boats after the GRELMARION matter the Trial Court heard also, as the Record shows, that the primary employment of these men was as workers on banana boats and that their employment as "extra hands" for grain-trimming was not a constant source of their income. The Record also discloses that within a day or two after the GRELMARION matter these men were able to return to their employment on banana boats, notwithstanding their alleged disabilities.